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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 728

J. C. HURWITZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the district court (R. 36–44) is reported at 208 F. Supp. 594.[1] The per curiam opinion of the court of appeals (Pet. 12) is reported at 320 F. 2d 911.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1963. (Pet. 2, 12.) A petition for rehearing was denied on October 9, 1963. (Pet. 2.) The petition for a writ of certiorari was filed on

[1] The opinion was written by the Honorable J. C. Hutcheson, Jr., Judge, United States Court of Appeals, sitting as a District Judge in this case. (R. 4, 44–45.)

January 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the courts below correctly held that the 1948 amendment to Section 812(c) of the Internal Revenue Code of 1939, eliminating the deduction for property previously taxed in cases in which the prior decedent was the spouse of the present decedent, applies both to the basic estate tax and the additional estate tax.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SUBCHAPTER A—BASIC ESTATE TAX

* * * * *

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

(a) *Exemption.*—An exemption of $100,000;

* * * * *

(c) [as amended by Sec. 407(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798; and Sec. 362 of the Revenue Act of 1948, c. 168, 62 Stat. 110] *Property Previously Taxed.*—An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or in-

heritance, or which can be identified as having been acquired in exchange for property so received. * * *

* * * * *

The following property shall not, for the purposes of this subsection, be considered as property with respect to which a deduction may be allowed: (A) property received from a prior decedent who died after December 31, 1947, and was at the time of such death the decedent's spouse, (B) property received by gift after the date of the enactment of the Revenue Act of 1948 from a donor who at the time of the gift was the decedent's spouse, and (C) property acquired in exchange for property described in clause (A) or (B).

* * * * * *

(26 U.S.C. 1952 ed., Sec. 812.)

SUBCHAPTER B—ADDITIONAL ESTATE TAX

SEC. 935. RATE OF TAX.

(a) In addition to the estate tax imposed by section 810 or 860, there shall be imposed upon the transfer of the net estate of every decedent dying after the date of the enactment of this title, whether a citizen or resident of the United States or nonresident not a citizen of the United States, a tax * * *

* * * * * *

(c) [as amended by Sec. 414(a) of the Revenue Act of 1942, *supra*] For the purposes of this section the value of the net estate shall be determined as provided in subchapter A, except that in lieu of the exemption of $100,000

provided in section 812(a), the exemption shall be $60,000.

(26 U.S.C. 1952 ed., Sec. 935.)

STATEMENT

Benjamin Samuel Hurwitz, the decedent, died on September 27, 1952. The federal estate tax return filed for his estate showed a gross estate of $325,755.15, including the sum of $145,543.06 which had been bequeathed to the decedent by his wife and taxed in her estate. Decedent's wife died testate on June 22, 1948. (R. 36–37.) The taxpayers, who are the executors of the decedent's estate, contend that, in computing the "additional estate tax" imposed by § 935 of the Code, $95,433.57 should be allowed as a deduction for property previously taxed in the estate of the wife. Taxpayers raise no question as to the basic estate tax, but only as to the computation of the additional tax. (R. 37.)

The district court upheld the government's contention that the deduction which taxpayers claim in computing the net estate for purposes of the additional tax is not allowable to them and, accordingly, the district court granted the motion of the government for judgment on the pleadings. The court of appeals affirmed *per curiam*. (R. 44–45; Pet. 12.)

ARGUMENT

Chapter 3 of the Internal Revenue Code of 1939 imposes (in subchapter A (§§ 800–931)), a "basic estate tax," and (in subchapter B (§§ 935–939)) an "additional estate tax." Both taxes are computed upon the decedent's net estate, *i.e.*, the gross estate less specified

deductions (§ 812). Section 812(c) allows a deduction for the value of property previously taxed in the estate of another decedent who died five years prior to the death of the present decedent. Section 935(c) provides that for purposes of the additional tax, the net estate shall be computed in the same manner as for the basic tax, "except that in lieu of the exemption of $100,000 provided in § 812(a), the exemption shall be $60,000." The Revenue Act of 1948 amended § 812(c) by adding the following paragraph:

> The following property shall not, for the purposes of this subsection, be considered as property with respect to which a deduction may be allowed: (A) property received from a prior decedent who died after December 31, 1947, and was at the time of such death the decedent's spouse * * *.[2]

This amendment was adopted at the same time as the provision creating the marital deduction (§ 812(e) of the 1939 Code, as added by § 361 of the Revenue Act of 1948) (see *Meyer* v. *United States*, 364 U.S. 410; *United States* v. *Stapf*, decided December 2, 1963 (No. 54, this Term)). It apparently reflected a Congressional decision that the marital deduction

[2] The law was completely revised by § 2013 of the 1954 Internal Revenue Code, but that provision operates only prospectively and is therefore inapplicable here. The new law (§ 2013 of the 1954 Code) provides for a credit for tax on prior transfers instead of a deduction for property previously taxed (see *United States* v. *Denison*, 318 F. 2d 819, 821–822 (C.A. 5th)), and the credit extends to property acquired from a spouse, but is, however, limited to the tax paid by the estate of the prior decedent upon that part of the property which did not qualify for the marital deduction. See Lowndes and Kramer, *Federal Estate and Gift Taxes*, (2d ed., 1962), p. 541.

should be the exclusive "interspousal" deduction. See S. Rep. No. 1013 (Part 2), 80th Cong., 2d Sess., pp. 21–23 (1948–1 Cum. Bull. 331, 346–347); Rudick, *Property Previously Taxed,* 53 Col. L. Rev. 761, 778 (1953).

The taxpayers maintain that the 1948 amendment to § 812(c) changes the definition of "net estate" only for purposes of the basic estate tax and not for purposes of the additional tax. They rely upon the canon of construction, alluded to by this Court in *Hassett* v. *Welch,* 303 U.S. 303, that where one statute (§ 935(c)) incorporates the terms of another (§ 812(c)), it takes the adopted statute as it exists at the time of adoption and does not include subsequent amendments unless a contrary intent is expressly indicated.[3] This contention is groundless. As the district court pointed out, the rule of construction upon which taxpayers rely is chiefly applicable in cases where a statute of one jurisdiction is incorporated into the laws of another.

[3] *Hassett* v. *Welch* itself is readily distinguishable. That case involved § 302(c) of the Revenue Act of 1926, which included in the decedent's gross estate any property interest of which he had at any time made a transfer in contemplation of, or intended to take effect in possession or enjoyment at or after death. Section 302(h) provided that § 302(c) would apply to such transfers whether made before or after the enactment of the Act. In 1931, § 302(c) was amended to include transfers of property with a retained life estate. The Court held that the amendment applied only prospectively, *i.e.*, was not "adopted" by § 302(h). While the Court alluded to the canon of construction relied upon by the taxpayers here, its decision chiefly rested upon the legislative history of the amendment, the consistent administrative interpretation in light of which the amendment was reenacted in 1932, and the general presumption that statutes do not operate retroactively.

In that situation, the adopting legislature has no continuing control over the contents of the adopted statute, and presumably does not intend that its own law should be dependent upon future action by another legislature. There is much less justification for the rule where, as here, the adopting and adopted statutes emanate from the same source and are integral parts of a single legislative scheme, since the legislature can easily make desired adjustments in the former at the time it revises the latter. Thus, if Congress, in amending § 812(c) had intended to define the concept of "net estate" differently for purposes of the additional tax than for purposes of the basic tax, it would undoubtedly have so provided, either in § 812 itself or in § 935(c).

It is evident, however, that Congress had no such intent. The manifest purpose of § 935(c) was not to adopt the specific deduction provisions of subchapter A as they stood in 1932 (the year subchapter B, including § 935(c), was enacted) but to make applicable to the entire estate-tax system the definition of "net estate" laid down in subchapter A. It is subchapter A which states what property is subject to the estate tax, sets forth the allowable deductions, prescribes the method of assessment and collection, and sets the basic rates. The sole function of subchapter B is to increase the effective estate tax rates. What § 935(c) does is simply to provide that these additional rates are to be applied to the same base amount as the subchapter A rates.

To apply taxpayer's rule of construction to § 935(c) would produce preposterous results. The basic tax is

a relatively insignificant element of the overall estate tax (ranging from 1% to 7% for net estates up to $1,000,000—§ 810); for practical purposes, the additional tax (from 3% to 37% on estates up to $1,000,000—§ 935(b)) *is* the estate tax. The taxpayers' construction would mean that every amendment since 1932 which affected the definition of the net estate—including the marital deduction itself—would be inapplicable in computing the main estate tax, contrary to the universal understanding and the consistent administrative practice.

CONCLUSION

The decision below is correct and, for the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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